Filed 5/19/09 P. v. Henry CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. BENNIE HENRY, Defendant and Appellant.	B207825 (Los Angeles County Super. Ct. No. VA091672)

APPEAL from a judgment of the Superior Court of Los Angeles County, Philip H. Hickok, Judge. Affirmed.

Leslie Conrad, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Bennie Henry appeals from a judgment of conviction entered after the jury found him guilty of first degree murder (Pen. Code, § 187, subd. (a))[1]. The jury found true the allegations that defendant personally and intentionally discharged a firearm which caused great bodily injury or death within the meaning of section 12022.53, subdivisions (b) through (d), and the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). The jury deadlocked on the special circumstance that the murder was committed during a robbery within the meaning of section 190.2, subdivision (a)(17). The trial court subsequently dismissed the special circumstance in the interests of justice pursuant to section 1385. The trial court sentenced defendant to a term of 25 years to life for the first degree murder, plus an additional 25 years to life for the firearm enhancement. The gang enhancement was stayed.

On appeal, defendant claims that the trial court erroneously limited his cross-examination of a prosecution witness, there was prosecutorial misconduct and prejudicial cumulative error. We find no grounds for reversal and affirm the judgment.

FACTS

On February 10, 2005, at approximately 7:00 p.m., Gabino Lopez (Lopez) walked from his residence to a market near the intersection of Nadeau Street and Parmelee Avenue in Los Angeles. While Lopez was in the market, David Ruiz (Ruiz) arrived in his car with his girlfriend, Destiny Sylvester (Sylvester), her three year old daughter and Deandre Welch (Welch). Ruiz, Sylvester and her daughter went inside the market. Ruiz, Sylvester, and Welch were all members of the 76 East Coast Crips.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Defendant and Dana Offley (Offley) approached the market on foot. They were also members of the 76 East Coast Crips. Lopez came out of the market with his purchases. Defendant approached him and demanded money. Lopez said he did not have any, and defendant shot him once in the chest from close range. The shot proved fatal. At trial, Sylvester and Welch identified defendant as the gunman.[2]

Sylvester stepped outside when she heard the gunshot. She saw defendant and Offley near a person who was lying on the ground. Defendant was holding a black, nine-millimeter handgun. Sylvester identified the gun as one that members of her gang used on "missions." Defendant put the gun back in his pocket. Sylvester, her daughter, and Welch returned with Ruiz to his car. Ruiz started to drive away, but stopped and allowed defendant and Offley to get into the vehicle. Ruiz dropped off defendant and Offley near the intersection of 78th Street and Parmelee Avenue.

After the shooting, Juan Duran (Duran) contacted police concerning his observations of the shooting. Duran was standing in a driveway near the market when two men jumped a fence and walked towards the market. He then heard gunshots. He identified one of the two men as Offley, a neighbor for more than 22 years. He was not able to identify the other individual because he had a sweater that covered his face.

On March 4, 2005, Sylvester was riding in a vehicle with three other individuals when the car was stopped by Los Angeles Police Officer Jason Liguori. Officer Liguori found a nine millimeter handgun in the vehicle. Test firing showed the gun was used to kill Lopez.

After Sylvester was arrested for burglary on March 25, 2005, she identified Offley and defendant in photographic lineups.

After defendant was arrested, a member of the 62nd Street East Coast Crips, Ernest Vannorsdell (Vannorsdell), agreed to wear a "wire" in an effort to get incriminating information from defendant. Vannorsdell agreed to do so because a

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[2] Lopez's money and personal property were not taken.

detective promised to speak on his behalf at his parole hearing. Vannorsdell indicated that he could not be released from prison without the approval of the parole board.

During a conversation in a jail laundry room, defendant told Vannorsdell he shot a Mexican. Defendant also said there was a camera inside the store, but he was wearing a hood. He added that some "homeboys" had been snitching on him. He thought that they would not have the courage to testify against him.

Detective Jonas Shipe, an expert on the 76 East Coast Crips gang, opined that the offense was committed for the benefit of the gang. There was a "race war" at the time of the shooting between the Crips and a Latino gang. Detective Shipe testified that defendant was a member of the 76 East Coast Crips and defendant attempted to enhance his status within the gang by committing the crime in the presence of other gang members.[3]

DISCUSSION

Restriction of Cross-Examination

Defendant contends that the trial court erroneously limited defendant's cross examination of Vannorsdell. Defendant asserts that he should have been allowed to explore whether Vannorsdell had previously conspired to manufacture evidence in attempting to overturn his own criminal conviction. We disagree and find that the trial court acted within its discretion in limiting cross-examination of Vannorsdell concerning his own criminal case.

Evidence Code section 352 gives the trial court the discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." If evidence is excluded

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[3] Defendant presented no witnesses in his defense.

under Evidence Code section 352 and that exclusion was erroneous, reversal is not required "unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice . . . ." (Evid. Code, § 354.)

While a defendant has the right to present evidence relevant to the theory of his defense, this right "does not require 'the court [to] allow an unlimited inquiry into collateral matters.'" (*People v. Ayala* (2000) 23 Cal.4th 225, 282.) The proffered evidence must be of more than slight or limited probative value. (*Ibid*.) Trial courts do not abuse their discretion in excluding evidence marginally relevant for impeachment purposes in order "'to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral . . . issues.'" (*People v. Hamilton* (2009) 45 Cal.4th 863, 946.)

Outside the presence of the jury, defense counsel argued that he wanted to question Vannorsdell as to the name of a person who testified against Vannorsdell in his criminal trial and to question him about a motion for a new trial. The offer of proof was that Vannorsdell persuaded an individual to recant and a motion for a new trial was denied. Defense counsel wanted to discuss the fact that Vannorsdell allegedly conspired to manufacture evidence in the motion for new trial.

The prosecutor, citing Evidence Code section 352, objected to the question and the proposed testimony, adding that if the court allowed the questioning, he might want to bring in witnesses to tell their side of the story. The trial court indicated that under Evidence Code section 352, it was going to exercise its discretion to exclude the testimony. The court stated that it was not going to allow a mini trial regarding Vannorsdell's prior trial, his motion for new trial, and the recanting of the witness.

In ruling on the proffered testimony, the trial court allowed counsel to set forth their positions and then ruled. The decision was certainly not made in an arbitrary, capricious or patently absurd manner that resulted in a miscarriage of justice. (*People v. Williams* (2008) 43 Cal.4th 584, 634-635.)

Moreover, the trial court allowed defense counsel wide latitude in his questioning of Vannorsdell. The questioning included Vannorsdell's prior convictions for conspiracy

to commit murder, attempted murder, and burglary. He was also questioned about his involvement in gangs, what information about the crime he received from law enforcement, and his motive for testifying.

The questioning of Vannorsdell was certainly sufficient to provide the jury with evidence as to the type of individual that was called as a witness for the prosecution. Exclusion of this evidence did not clothe Vannorsdell with "a false aura of veracity." (*People v. Beagle* (1972) 6 Cal.3d 441, 453.) It is extremely doubtful that any additional questioning of the witness would have affected the impression of the witness given by his testimony and his background.

Defendant's reliance on *People v. Mickle* (1991) 54 Cal.3d 140 is misplaced. In *Mickle*, the trial court erred in excluding letters written by a jailhouse informant to judges in three separate criminal cases pending against him, in which he offered to inform on various people in exchange for leniency and in which he explained that he feared death or injury in prison. The informant insisted that he expected no benefit and was testifying for purely unselfish reasons. The Supreme Court concluded that the proffered letters impliedly contradicted his claim and suggested that he certainly had a heightened interest in currying favor with the prosecution and avoiding the risk of harm he associated with being in custody. (*Id*. at p. 168.)

In the instant case, defense counsel wanted to inquire into a motion for new trial and the allegation that Vannorsdell had manufactured evidence, a far cry from the informant in *Mickle*, who had written letters to judges in three separate criminal cases pending against him in an effort to obtain leniency for himself. In *Mickle*, the informant indicated that he simply wanted to "'help society'" and become a "'better'" person. (*People v. Mickle*, *supra*, 54 Cal.3d at p. 167.) His testimony about the letters he had previously written was certainly relevant. Vannorsdell, on the other hand, admitted his desire to benefit from Detective Shipe's promise to speak on his behalf at a parole hearing. He had a motive for his testimony. In *Mickle*, the jury was denied the opportunity to hear the motive the informant had in testifying and to judge his credibility based upon the motive.

It is true that a defendant has the right to have the trier of fact consider pertinent evidence in his behalf. "Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of *significant* probative value to his defense." (*People v. Reeder* (1978) 82 Cal.App.3d 543, 553.) However, this does not mean "a defendant has a constitutional right to present all relevant evidence in his favor, no matter how limited in probative value such evidence will be so as to preclude the trial court from using Evidence Code section 352." (*Ibid*.; accord, *People v. Milner* (1988) 45 Cal.3d 227, 240, fn. 11.) We are not persuaded by defendant's argument that the ruling limiting cross examination of Vannorsdell was so unduly restrictive as to violate his Sixth Amendment right of confrontation.

Even assuming error, the limitation on cross-examination of Vannorsdell was harmless. Where the precluded cross-examination would have yielded a "significantly different impression" of a witness, the confrontation clause is implicated and the prosecution must demonstrate any error was harmless beyond a reasonable doubt within the meaning of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. Otherwise, applying the *People v. Watson* (1956) 46 Cal.2d 818, 836 standard, the defense has the burden of demonstrating it is reasonably probably defendant would have received a more favorable verdict in the absence of the limitation of cross-examination. (See *People v. Franklin* (1994) 25 Cal.App.4th 328, 336-337.)

Under either the *Chapman* or *Watson* standard, any error was harmless. Defendant was identified by two fellow gang members who were present at the scene and members of the same gang. In *People v. Brown* (2003) 31 Cal.4th 518, 546, the court recognized that testimony of a witness that was largely consistent with that of other witnesses would make any error harmless beyond a reasonable doubt.

Defendant contends that the two fellow gang members, Sylvester and Welch, had a motive to frame him for a shooting possibly committed by Offley because defendant was from a different subset of the Crips. The evidence at trial does not support this contention. Welch indicated that there was no feuding between the various factions of the gang. Based upon the testimony of Sylvester and Welch, Vannorsdell was not an

essential witness in the case of the prosecution. Even without the testimony of Vannorsdell, the evidence against defendant was compelling. Therefore, any error would have been harmless.

Prosecutorial Misconduct

Defendant claims that during the prosecutor's argument, the prosecutor committed misconduct by appealing to the passion and sympathy of the jury (*People v. Mayfield* (1997) 14 Cal.4th 668, 803). He contends the misconduct was so pervasive as to violate his due process right to a fair trial. (*People v. Cook* (2006) 39 Cal.4th 566, 606.)

During the prosecutor's argument, he stated over defense counsel's overruled objection: "If justice means that this family will sleep better tonight because the man who killed [¶] . . . [¶] their poor father [¶] . . . [¶] was finally brought to justice, then that's a guilty verdict. [¶] But if justice for you means that [defendant] walks, fine. All I ask is that you go back to the evidence. Go back to this evidence, ladies and gentlemen."

The People argue that defendant forfeited his claim because he did not object on constitutional grounds. The issue of prosecutorial misconduct may not be raised on appeal absent a timely objection and request for admonition below unless the nature of the misconduct was such that an objection and admonition would have been futile to obviate its prejudicial effect. (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1056; *People v. Lewis* (1990) 50 Cal.3d 262, 282.) Defendant contends that because the trial court overruled his objection to the argument, it was not likely the court would have sustained an objection on constitutional grounds. Inasmuch as there was no prosecutorial misconduct, we need not reach the People's claim that defendant forfeited his claim because he did not object on constitutional grounds.

In *Berger v. United States* (1935) 295 U.S. 78 [55 S.Ct. 629, 79 L.Ed. 1314], the Supreme Court stated that the prosecuting attorney "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be

done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Id*. at p. 88.)

It is misconduct to ask the jurors to put themselves in the victim's place in order to appeal to the jurors' sympathy or passions. (*People v. Stansbury*, *supra*, 4 Cal.4th at p. 1057; *People v. Fields* (1983) 35 Cal.3d 329, 362.) It is the burden of the defendant to show the existence of misconduct. (*People v. Van Houten* (1980) 113 Cal.App.3d 280, 292.)

In determining whether a prosecutor's statements constitute misconduct, we "must view the statements in the context of the argument as a whole." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) The challenged statement, viewed in the context of the argument as a whole, does not constitute misconduct.

The prosecutor discussed the standard of proof beyond a reasonable doubt and told the jury that the case "really is about the evidence." The prosecutor specifically told the jury to follow the law including that part which "tells you to not let bias sympathy prejudice or public opinion influence your opinion." We find that it was highly unlikely that the jury would have considered the brief comment objected to by defendant as an invitation to consider sympathy for the victim's family, considering that the prosecutor had previously admonished the jury not to let bias, sympathy or prejudice affect the verdict.

Cumulative Error

Defendant asserts that cumulative error requires reversal. Since we have found no error, this argument is without merit.

DISPOSITION

The judgment is affirmed.

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JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.